



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

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**TO:** The Commission

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**RE:** MUR 6848 (George Demos, *et al.*)  
Office of General Counsel's Notice to the Commission Following the  
Submission of Probable Cause Brief

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**I. INTRODUCTION**

On September 17, 2018, the Office of General Counsel ("OGC") notified counsel for Respondents that it was prepared to recommend that the Commission find probable cause to believe that Chrysanthi T. Demos violated 52 U.S.C. § 30116(a)(1)(A); that George Demos and Friends of George Demos and Robert Cole in his official capacity as treasurer (the "Committee") violated 52 U.S.C. § 30116(f); and that the Committee violated 52 U.S.C. § 30104(b).<sup>1</sup> OGC included with this notification a General's Counsel's Brief setting forth the factual and legal basis for the recommendation.<sup>2</sup>

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<sup>1</sup> See 52 U.S.C. § 30109(a)(3), 11 C.F.R. § 111.16(a); *see also* Agency Procedure Following the Submission of Probable Cause Briefs by the Office of General Counsel, 76 Fed. Reg. 63,570 (Oct. 13, 2011).

<sup>2</sup> A copy of the Brief was circulated to the Commission informationally on September 19, 2018.

1 Respondents filed a reply brief on October 3, 2018, and requested a probable cause  
2 hearing pursuant to *Procedural Rules for Probable Cause Hearings*, 72 Fed. Reg. 64,919  
3 (Nov. 19, 2007). A hearing was held on October 31, 2018.  
4

5 Pursuant to the *Agency Procedure Following the Submission of Probable Cause Briefs by*  
6 *the Office of General Counsel*, 76 Fed. Reg. 63,570 (Oct. 13, 2011), OGC is hereby notifying the  
7 Commission that it intends to proceed with the recommendations to find probable cause to  
8 believe, based on the factual and legal analysis set forth in the General Counsel's Brief. In  
9 addition, an analysis of two of the arguments presented in Respondents' Reply Brief and at the  
10 Probable Cause Hearing is provided below. Both of these arguments were identified by the  
11 Commission at the conclusion of the hearing as areas in which it was interested in receiving  
12 further response from OGC.  
13

14 A copy of this Notice is being provided to Respondents at the same time that it is  
15 circulated to the Commission.  
16

## 17 II. ANALYSIS

### 18 A. The Commission Can Examine Pre-Candidacy Activity

19 Respondents argue that the Act does not authorize the Commission to examine actions  
20 that occurred before the filing of a Statement of Candidacy when determining whether a  
21 violation of the Act occurred.<sup>3</sup> They argue that the \$2.5 million that Demos loaned to his  
22 campaign were all his personal funds because Demos "had legal right of access to or control  
23 over" funds at the time that he became a candidate and that the regulation at 11 C.F.R.  
24 § 100.33(a) establishes a "bright line" rule to that effect.<sup>4</sup> Based on this bright-line theory, they  
25 argue that because the transfer of the funds into the Demos's joint account occurred pre-  
26 candidacy the Commission lacked jurisdiction to regulate that activity.<sup>5</sup> Further, they argue that  
27 Respondents lacked notice that the Commission would conduct such an examination in this  
28 matter.<sup>6</sup>  
29  
30

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3 Reply Brief at 11-12.

4 *Id.* at 6-8.

5 *Id.* at 11-12.

6 *Id.* at 13-17.

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1 Respondents' argument that the Commission is without jurisdiction to examine pre-  
2 candidacy activities is meritless. The Commission regularly examines pre-candidacy activity in  
3 connection with its consideration of different types of alleged violations. For example, the  
4 Commission typically examines the history of pre-candidacy gift-giving in family contribution  
5 cases; in fact, the Reply Brief cites to some of those matters dating back to 2003 (*e.g.*, MUR  
6 5133).<sup>7</sup> Those matters also serve as sufficient notice to candidates that the Commission may  
7 review pre-candidacy financial activity, depending on the facts and circumstances of the case.

8  
9 Similarly, the Commission looks to pre-candidacy activity when determining whether a  
10 candidate timely filed a Statement of Candidacy or, as Respondents acknowledge, to determine  
11 whether a committee properly reported testing-the-waters activity. Inherent in those  
12 investigations is an examination of whether the candidate's actions before the candidacy  
13 announcement triggered obligations under the Act. For instance, the Commission will examine  
14 whether the amount of receipts accepted and disbursements made triggered candidacy; whether  
15 the candidate or committee made payments for polling, telephone calls, or travel directed to an  
16 evaluation of the feasibility of candidacy; whether the candidate engaged in activities signifying  
17 that a decision to become a candidate had been made; or whether the candidate made, or  
18 authorized, public statements referring to themselves as a candidate.<sup>8</sup>

19  
20 Notably, Respondents relied on pre-candidacy events in their Reply Brief and at the  
21 Probable Cause hearing to bolster their position. Their argument that the \$3 million deposit was  
22 simply a piece of the joining of the Demos's financial lives relies heavily on pre-candidacy  
23 events: most notably, their marriage, the birth of their child, and their purchase of an apartment.<sup>9</sup>

24  
25 A bright-line test would also create easily exploitable loopholes to the Act's core  
26 limitations and prohibitions.<sup>10</sup> Under this test, monetary gifts that would otherwise exceed the  
27 contribution limits or would be otherwise prohibited would become 100% available for  
28 campaign use—as long as the gifts were given and deposited in a joint account a moment before  
29 the candidacy announcement. Such gifts could come from mega-donors, foreign nationals,  
30 corporations, or government contractors, and the Commission would be powerless to do anything  
31 about them. This absurd result cannot be what Congress intended.

32  
<sup>7</sup> See, *e.g.*, Reply Brief at 15 (citing to family contribution cases where the Commission examined pre-candidacy activity).

<sup>8</sup> See, *e.g.*, 11 C.F.R. §§ 100.72(b), 100.131(b) (setting forth a non-exhaustive list of activities that the Commission may consider in determining whether an individual has decided to become a candidate); *see also* MUR 6735 (Joseph Sestak), MUR 6533 (Perry Haney), MUR 6449 (Jon Bruning).

<sup>9</sup> Reply Brief at note 4; Ltr. from Robert Lenhard at 2 (Mar. 24, 2017).

<sup>10</sup> 52 U.S.C. § 30116(f). In the context of an audit, OGC has previously noted to the Commission the pitfalls of attributing the entire value of a joint account to a candidate, stating that if "the Commission considers the Candidate's joint checking account balance as the source of the funds that is available for a loan to the committee, the balance could be used as a vehicle to conceal a contribution from another source." OGC Comments to Interim Audit Report on Bill Spadea for Congress (LRA # 702) at 2, 5 (Sept. 11, 2006); FAR, Bill Spadea for Congress (Jan. 23, 2007).

1 A bright-line test would also prevent the Commission from carrying out its statutory  
2 enforcement duties in cases in which pre-candidacy information provides critical context as to  
3 whether contributions may have been excessive or prohibited – a context that is central to the  
4 excessive contributions at issue here. An examination of whether a candidate has a legal right or  
5 access or control over funds necessarily involves reviewing financial activity that took place pre-  
6 candidacy to establish how and when the candidate obtained legal title or interest to an asset.

7  
8 **B. Respondents' Constitutional Arguments are Meritless**  
9

10 The Supreme Court has explicitly held the family contribution limit to be constitutional,  
11 and, unsurprisingly, no court has created a spousal exception to this rule. Thus, the Commission  
12 must give the provision its full effect.<sup>11</sup> Respondents' invitation that the Commission speculate  
13 as to what the Supreme Court *might* do in light of *McCutcheon v. FEC*,<sup>12</sup> and then convert that  
14 guess into Commission law, should be rejected.

15  
16 The Act provides that "no person" shall make contributions that exceed the applicable  
17 limits of the Act.<sup>13</sup> A "person" is defined as "an individual, partnership, committee, association,  
18 corporation, labor organization, or any other organization or group of persons."<sup>14</sup> Consequently,  
19 under the plain language of the statute, an immediate family member, including a spouse, is  
20 prohibited from making an excessive contribution. The Reply Brief challenges the  
21 constitutionality of proceeding against the Respondents because "there is no risk of quid-pro-quo  
22 corruption" between spouses.<sup>15</sup>

23  
24 The Supreme Court in *Buckley v. Valeo* upheld the constitutionality of the Act's  
25 contribution limits as applied to members of a candidate's family, including a spouse.<sup>16</sup> In  
26 *Buckley*, the Supreme Court rejected the lower court's interpretation that the Act "relax[ed]" the  
27 individual limits as to the candidate's immediate family, as well as the Commission's similar  
28 interpretation in Advisory Opinion 1975-65 (Bell), noting that "both the Court of Appeals and  
29 the Commission apparently overlooked the Conference Report accompanying the final version of  
30 the Act which expressly provides for a contrary interpretation."<sup>17</sup> The Court cited to that report,

<sup>11</sup> Advisory Op. 2012-32 at 3 (Tea Party Leadership Fund) (citing "*Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is generally outside an administrative agency's authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) (noting in the context of the Commission's administrative enforcement process that "[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional)").

<sup>12</sup> *McCutcheon v. FEC*, 572 U.S. 185 (2014).

<sup>13</sup> 52 U.S.C. § 30116(a).

<sup>14</sup> *Id.* § 30101(11).

<sup>15</sup> Reply Brief at 13, 16-21.

<sup>16</sup> *Buckley*, 424 U.S. 1, 53 n.59 (1976) (noting "the risk of improper influence" resulting from contributions made by family members are "somewhat diminished" but not "sufficiently reduced").

<sup>17</sup> *Id.* at 51 n.57.

1 stating: "It is the intent of the conferees that members of the immediate family of any candidate  
2 shall be subject to the contribution limitations established by this legislation."<sup>18</sup> Thus, although  
3 *Buckley* did not specifically address spousal contributions, it upheld limits on family  
4 contributions, and the provision at issue defined "immediate family" to mean "a candidate's  
5 *spouse*, and any child, parent, grandparent, brother, or sister of the candidate and the spouses of  
6 such persons."<sup>19</sup>

7  
8 Since *Buckley*, the Commission has consistently applied the Act's contribution limits to a  
9 candidate's family members, including spouses.<sup>20</sup> Without any other legal authority overruling  
10 *Buckley* or any other court case holding that limits on spousal contributions are unconstitutional,  
11 the Commission must continue to apply the Act's provisions to Ms. Demos. In Advisory  
12 Opinion 2012-32 (Tea Party Leadership Fund), which involved a constitutional challenge to the  
13 Act's contribution limits at section 30116(a)(1)(A) and the definition of a "multicandidate  
14 committee" at section 30116(a)(4), the Commission recognized that it lacked the power to make  
15 a determination that those provisions were unconstitutional because no court had invalidated  
16 them. Accordingly, the Commission stated that it "was required to give these provisions full  
17 force," a requirement that applies equally here.<sup>21</sup>

### 18 19 **III. RECOMMENDATION**

20  
21 Find probable cause to believe that Chrysanthi Demos violated 52 U.S.C.  
22 § 30116(a)(1)(A), that George Demos and the Committee violated 52 U.S.C. § 30116(f), and that  
23 the Committee violated 52 U.S.C. § 30104(b).

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<sup>18</sup> *Id.*

<sup>19</sup> 424 U.S. at 188 (reprinting text of the statutory provisions at issue, including 18 U.S.C. § 608 (a)(2) (defining "immediate family," in appendix to per curiam opinion)).

<sup>20</sup> See, e.g., Factual and Legal Analysis at 6 n.24, MUR 6860 (Land); Factual and Legal Analysis at 5, MUR 6417 (Huffman); Factual and Legal Analysis at 5 n.1, MURs 6363 and 6440 (Friends of Frank Guinta); Factual and Legal Analysis at 13, MURs 5334, 5341, and 5524 (O'Grady).

<sup>21</sup> Advisory Op. 2012-32 at 3 (Tea Party Leadership Fund).